



DEPARTMENT OF ADMINISTRATIVE AND FINANCIAL SERVICES
BUREAU OF REVENUE SERVICES, INCOME/ESTATE TAX DIVISION

Rule No. 808 (18-125 CMR 808)

CORPORATE INCOME TAX NEXUS

SUMMARY: This rule describes the circumstances under which a foreign corporation is subject to the income tax jurisdiction of Maine under 36 M.R.S.A., Part 8.

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.01 Definitions.

A. Assessor. "Assessor" means the State Tax Assessor or any designated agent.

B. Bureau. "Bureau" means the Maine Bureau of Revenue Services, also known as "Maine Revenue Services."

C. Documentary evidence. "Documentary evidence" means journals, books of account, invoices, expense reports, or other records maintained by a taxpayer in the regular course of its business. Generally, an affidavit or other document prepared in anticipation of, or in response to a tax audit, examination, or litigation is not documentary evidence.

D. Employee. "Employee" means any individual who would be considered an employee under the common law rules governing the employee-employer relationship. An individual is presumed to be an employee of a foreign corporation rather than an independent contractor if the foreign corporation treats the individual as an employee for purposes of the payroll taxes imposed by the Federal Insurance Contributions Act.

E. Foreign corporation. "Foreign corporation" means a business entity formed under the laws of a jurisdiction other than the State of Maine. A "foreign corporation" may be a "C" corporation, a limited liability company, or other entity.

F. Missionary sales activity. "Missionary sales activity" means the activity of generating retail demand for the products of a manufacturer or distributor (and indirectly generating wholesale orders for those products) by promoting the products to retailers who typically order the products from a wholesaler or other middleman.

G. Office. "Office" means a permanent or temporary location where a corporation makes sales or holds itself out to the public as conducting business. The office of a corporation's sales representative is generally not an "office" of the corporation for purposes of this rule if the representative does not publicly hold him- or herself out as doing business on behalf of the corporation at that location, either by publishing the home address as a corporate business address or through other actions.

H. Partnership. "Partnership" means any entity considered to be a partnership under common-law rules, under the provisions of the Uniform Partnership Act (including a Limited Liability Partnership registered under the provisions of 31 M.R.S.A., Chapter 15), or under the provisions of the Uniform Limited Partnership Act, 31 M.R.S.A. Chapter 11. "Partnership" also includes a Limited Liability Company formed under the provisions of 31 M.R.S.A., Chapter 13 if the LLC is recognized as a partnership by the Internal Revenue Service.

I. Sample or display area. "Sample or display area" means a temporary location, such as a hotel room or space in a trade show exhibit, where representatives of a foreign corporation exhibit samples of the corporation's products, but do not make sales, approve orders for sales, or conduct any of the activities listed at section .03, subsection (B).

J. Samples. "Samples" means representative products of corporation that are used in sales demonstrations or distributed in limited quantities without charge in order to acquaint existing or prospective customers with the corporation's products.

.02 General rule for evaluation of corporate nexus. A foreign corporation is subject to Maine income tax if it conducts business activity in Maine and has income properly apportionable to Maine pursuant to Title 36 M.R.S.A., chapter 821, regardless of whether it is authorized to do business in this State. The State Tax Assessor construes Maine law to assert the tax jurisdiction of Maine to the full extent permitted by the Constitution and laws of the United States. In general, a foreign corporation is subject to the tax jurisdiction of Maine if it engages in any of the activities listed at section **.03** of this rule, unless those activities fall within the exceptions described in section **.04**, subsection **(D)** (relating to Public Law 86-272), or in section **.05** (other exceptions).

.03 Activities establishing nexus. Except as provided below in sections **.04** and **.05**, a foreign corporation generally has income tax nexus with Maine if it (a) does business in Maine; or (b) owns or uses any part or all of its capital, plant, or other property in Maine in a corporate capacity, as opposed to a strictly fiduciary capacity.

A. Doing business. Without limitation, a foreign corporation does business in Maine if it engages in any of the following activities in this state:

1. Maintains an office or other place of business;
2. Executes a contract;
3. Exercises or enforces contract rights;
4. Buys, sells or procures services or property; or
5. Employs labor.

B. Owning or using property. Without limitation, a foreign corporation owns or uses property in Maine if it:

1. Owns property that is held by another person in this State under a lease, consignment, or other arrangement;
2. Uses in this State property that it holds under a lease, license, or other arrangement; or
3. Maintains a stock of goods in this State.

.04 Exception for Certain Solicitation Activities (P. L. 86-272). A foreign corporation that does business in Maine or owns or uses property in Maine is nevertheless not subject to the Maine income tax if its activities in this State are all activities that are set forth in Public Law 86-272 (15 United States Code ' 381 et seq.). P.L. 86-272 precludes Maine from imposing a tax on the income of a foreign corporation if the sole activity of the foreign corporation in the State is the solicitation by the foreign corporation's representatives (in the name of the foreign corporation or in the name of a prospective customer) of orders for the sale of tangible personal property, provided that the orders are sent outside of the State of Maine for approval or rejection, and provided that the orders are filled by shipment or delivery outside of Maine. Some examples of common solicitation activities are found at subsection **(D)** below.

A. Limitations. P.L. 86-272 restricts a state's tax jurisdiction with respect to sales solicitation activities only if the taxpayer's activity is limited to solicitation of orders for the sale of **tangible personal property**. P.L. 86-272 does **not** afford protection in the following circumstances:

1. A **combination** of solicitation activities and non-solicitation activities in Maine;
2. The solicitation of orders for the sale or provisions of **services**, either standing alone or in combination with the solicitation of orders for tangible property. Some examples of the sale of a mixture of services and tangible personal property are photographic development and the provision of architectural or engineering services; and
3. The solicitation of orders for the sale, lease, rental, license, or other disposition of **real property** or **intangibles**.

B. Scope of "solicitation." Whether the activities of a foreign corporation fall within the scope of "solicitation" within the meaning of P.L. 86-272 is a factual determination. The examples of activities provided at subsection **(D)** and **(E)** below are intended as guidelines. They are not exhaustive and will not precisely describe the activities of many foreign corporations. In applying the guidelines to particular circumstances and activities of specific foreign corporations, the Assessor will use the following rules of construction:

1. The term "solicitation" includes only actual requests for purchases and activities that are entirely ancillary to requests for purchases. An activity is entirely ancillary to the requesting of purchases only if it serves no independent business purpose apart from its connection to the soliciting of orders.
2. Activities conducted by a foreign corporation with respect to a particular order generally do not constitute "solicitation" if they occur after the order has been placed.

C. De minimis activities. Non-solicitation business activities conducted by a foreign corporation in Maine will not subject the foreign corporation to taxation if the activities, taken together, are *de minimis*. *De minimis* activities are those that establish only a trivial additional connection with this State. An activity regularly conducted within this State pursuant to company policy or on a continuous basis will not normally be considered trivial. Whether or not an activity consists of a trivial additional connection with Maine is measured on both a qualitative and quantitative basis. If the activity either qualitatively or quantitatively creates a non-trivial connection with the State of Maine, the activity does not qualify for the protection afforded by P.L. 86-272. Establishing that the disqualifying

activities account for a relatively small part of the business conducted within this State is not determinative of whether a *de minimis* level of activity exists. The relative economic importance of the disqualifying in-state activities, as compared to the protected activities, does not determine whether the conduct of the disqualifying activities within the taxing State is inconsistent with the limited protection afforded by P.L. 86-272. If the Assessor believes that a taxpayer conducts in this State any activity listed in subsection (E) below, the Assessor will require the taxpayer to carry the burden of substantiating any claim that its activities were *de minimis*. Documentary evidence will be given substantial weight in establishing the nature and extent of the taxpayer's activities. Affidavits or other evidence not contemporaneous with the events in question will be given little weight.

D. Protected activities. The following in-state activities conducted by a foreign corporation will not cause the loss of protection for otherwise protected sales that occur in the State of Maine:

1. Soliciting orders for sales by any type of advertising;
2. Soliciting of orders by an in-state resident employee or representative of the foreign corporation, so long as such person does not maintain or use any office or other place of business in the state other than an "in-home" office as described in subsection (E), paragraph 20 below;
3. Carrying samples and promotional materials only for display or for distribution without charge or other consideration;
4. Furnishing and setting up display racks and advising customers on the display of the foreign corporation's products without charge or other consideration;
5. Providing automobiles to sales personnel for their use in conducting protected activities;
6. Passing orders, inquiries and complaints on to the corporation's home office;
7. Missionary sales activities and advertising campaigns incidental to missionary sales activities;
8. Coordinating shipment or delivery without payment or other consideration and providing information relating thereto either before or after the placement of an order;

9. Checking of customers' inventories without a charge therefor (for re-order, but not for other purposes such as quality control);
10. Maintaining a sample or display room for an aggregate of 14 days or fewer during the tax year, provided that no sales or other activities inconsistent with mere solicitation take place;
11. Recruiting, training or evaluating sales personnel, including occasionally using homes, hotels or similar places for meetings with sales personnel;
12. Mediating direct customer complaints with the sole purpose of ingratiating the sales personnel with the customer and facilitating requests for orders; and
13. Owning, leasing, using or maintaining personal property for use in the "in-home" office or automobile of an employee or representative, when the use of the personal property is limited to the conducting of protected activities. Thus the use by a foreign corporation's employee or representative of equipment such as a cellular telephone, facsimile machine, photocopier or personal computer, when limited strictly to the carrying on of protected solicitation and activity entirely ancillary to such solicitation or permitted by this rule, does not, by itself subject the foreign corporation to Maine's income tax jurisdiction.

E. Unprotected activities. The following in-state activities conducted by a corporation (assuming they are not *de minimis* -- see subsection (C) above) will cause otherwise immune sales to lose their immunity:

1. Making repairs or providing maintenance or service to the property sold or to be sold;
2. Collecting current or delinquent accounts, whether directly or by third parties, through assignment or otherwise;
3. Investigating credit worthiness;
4. Installation or supervision of installations at or after shipment or delivery;
5. Conducting training courses, seminars or lectures for personnel other than personnel involved only in solicitations;
6. Providing any kind of technical assistance or services, including, but not limited to, engineering assistance or design services, unless

the purpose of such assistance or services is solely to facilitate the solicitation of orders;

7. Investigating, handling, or otherwise assisting in resolving customer complaints, other than mediating direct customer complaints with the sole purpose of ingratiating sales personnel with the customer and facilitating requests for orders;

8. Approving or accepting orders;

9. Repossessing property;

10. Securing deposits on sales;

11. Picking up or replacing damaged or returned property or stale or unsalable inventory;

12. Hiring, training, or supervising personnel, other than personnel involved only in solicitation;

13. Using agency stock checks or any other instrument or process by which sales are made within this state by sales personnel;

14. Maintaining a sample or display room in excess of two weeks (14 days) at any one location during the tax year;

15. Carrying samples for sale, exchange or distribution in any manner for consideration or other value;

16. Owning, leasing, using, or maintaining any of the following facilities or property:

- a. Repair shop.
- b. Parts department.
- c. Any kind of office other than an in-home office as described in subsection 20 below.
- d. Warehouse.
- e. Meeting place for directors, officers or employees.
- f. Stock of goods other than samples for sales personnel or goods used entirely ancillary to solicitation.
- g. Telephone answering service that is publicly attributed to the company or to an employee or agent of the company.

- h. Mobile stores, *i.e.*, vehicles with drivers who are sales personnel making sales from the vehicles.
- i. Real property or fixtures to real property of any kind.

17. Consigning stocks of goods or other tangible personal property to any person, including an independent contractor, for sale;

18. Conducting any activity not listed in subsection **(D)** above that is not entirely ancillary to requests for orders, even if such activity helps to increase orders;

19. Owning an interest in any partnership, grantor trust, or other pass-through entity whose activities, if conducted directly by a foreign corporation, would give Maine jurisdiction over the foreign corporation, unless the activities of the pass-through entity are limited to solicitation protected by P.L. 86-272;

20. Maintaining, by any employee or other representative, an office or place of business of any kind, other than an in-home office located within the residence of the employee or other representative that (1) is not publicly attributed to the company or to the employee or representative of the company in such capacity, and (2) is used solely for soliciting and receiving orders from customers, for transmitting such orders outside the state for acceptance or rejection by the corporation, or for other activities protected by P.L. 86-272 or section **(D)** of this rule. If the corporation maintains a telephone or other public listing within the state either in its own name or in the name of its employee or representative in such capacity, or if there is any other indication through advertising or business literature that the corporation or its employee or representative can be contacted at a specific address within the state, the Assessor will normally view the corporation's activities as exceeding the protection afforded by P.L. 86-272. However, the normal distribution and use of business cards and stationery identifying the employee or representative's name, address, telephone and fax numbers and affiliation with the company will not, by itself, be considered unprotected activity. The maintenance of any office or other place of business in this state that does not strictly qualify as an "in-home" office as described above causes the loss of protection. For the purpose of this rule, it is not relevant whether the corporation pays directly, indirectly, or not at all for the cost of maintaining an in-home office; and

21. Entering into a franchising or licensing agreement; selling or otherwise disposing of franchises and licenses; or selling or otherwise transferring tangible personal property pursuant to such franchise or license by the franchiser or licensor to its franchisee or licensee with the state.

.05 Other Exceptions.

A. General. A foreign corporation is not subject to the Maine income tax if its contacts with this State are limited exclusively to one or more of the activities listed in subsection (B) through (D) below. The activities listed below will not create jurisdiction even if they also fall within the scope of activities that would otherwise create jurisdiction under section .04, subsection (E) above.

B. Federal limitations (other than P.L. 86-272). A foreign corporation's activities will not subject it to the income tax jurisdiction of Maine if the constitution or laws of the United States preclude the exercise of jurisdiction.

C. Ownership of shares. A foreign corporation is not subject to the Maine income tax solely because it owns shares of a corporation that does business in Maine.

D. Maintenance of accounts. A foreign corporation is not subject to the Maine income tax solely because of its depositing of funds or maintenance of securities brokerage accounts with financial institutions, unrelated to the foreign corporation, that do business in Maine.

.06 Imputed activity. For the purposes of determining whether a foreign corporation is subject to Maine's tax jurisdiction, the activities of the corporation's employees, agents, or representatives, however designated, will be imputed to the corporation. An agent or representative may be an individual, corporation, partnership or other entity. Activities conducted in Maine on behalf of a foreign corporation by an independent contractor that are more than de minimis in nature and that are significantly associated with the foreign corporation's ability to establish and maintain a market in Maine will be imputed to the corporation to the extent allowed by the Constitution and laws of the United States.

AUTHORITY: 36 M.R.S.A., Section 112

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